



January 9, 2001

Ms. Margaret Hoffman, Director
Environmental Law Division
Texas Natural Resource Conservation Commission
P.O. Box 13087
Austin, Texas 78711-3087

OR2001-0101

Dear Ms Hoffman:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 143021.

The Texas Natural Resource Conservation Commission ("TNRCC") received a request for all information relating to a proposed revision of chapter 110 of title 30 of the Texas Administrative Code and the corresponding revisions to the state implementation plan. You state that you have released most of the responsive documents. However, you claim that the remainder of the requested information is excepted from disclosure under section 552.111 of the Government Code. Furthermore, you indicate that the requested information may invoke the proprietary rights of a third party, Engelhard Corporation ("Engelhard"). Accordingly, pursuant to section 552.305 of the Government Code, you have notified Engelhard of the request for information in order to afford it an opportunity to submit objections to release of the requested information. *See* Gov't Code § 552.305 (permitting interested third party to submit to attorney general reasons why requested information should not be released); Open Records Decision No. 542 (1990) (determining that statutory predecessor to Gov't Code § 552.305 permits governmental body to rely on interested third party to raise and explain applicability of exception in Public Information Act in certain circumstances). In turn, Engelhard has submitted arguments to this office, claiming that the information is excepted under section 552.110 of the Government Code. We have considered the arguments of TNRCC and Engelhard and have reviewed the submitted information.

Section 552.101 of the Government Code excepts from disclosure information that is made confidential by statute. *See* Gov't Code § 552.101. Section 382.041(a) of the Health and Safety Code provides in part, with exceptions which do not appear to apply here, that "a member, employee, or agent of the commission may not disclose information submitted to

the commission relating to secret processes or methods of manufacture or production that is identified as confidential when submitted.” In Open Records Decision No. 652 (1997), this office concluded that section 382.041 of the Health and Safety Code protects information submitted to the commission if a *prima facie* case is established that the information is a trade secret under the definition set forth in the Restatement of Torts, and if the information was identified as confidential by the submitting party when it was submitted to the commission.

Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. The governmental body, or interested third party, raising this exception must provide a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury to the third party would likely result from disclosure. Gov’t Code § 552.110(b); *see also National Parks & Conservation Ass’n v. Morton*, 498 F.2d 765 (D.C. Cir. 1974).

The Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d 763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is

any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement’s definition of trade secret as well as the Restatement’s list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt.

b (1939).¹ This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). After reviewing Engelhard's arguments and the submitted documents, we agree that the documents that TNRCC has marked as being excepted under section 552.110 are trade secrets and must be withheld from disclosure under section 552.110 as well as section 382.041 of the Health and Safety Code. We also note that the requested material contains one other piece of information that appears to be the trade secret of Engelhard and must be withheld under section 382.041 of the Health and Safety Code and section 552.110 of the Government Code. We have marked this document.

TNRCC claims that some of the requested information is excepted under section 552.111. Section 552.111 excepts from disclosure "an interagency or intraagency memorandum or letter that would not be available by law to a party in litigation with the agency." In Open Records Decision No. 615 (1993), this office reexamined the predecessor to the section 552.111 exception in light of the decision in *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408 (Tex. App.--Austin 1992, no writ), and held that section 552.111 excepts only those internal communications consisting of advice, recommendations, opinions, and other material reflecting the policymaking processes of the governmental body. An agency's policymaking functions do not encompass internal administrative or personnel matters; disclosure of information relating to such matters will not inhibit free discussion among agency personnel as to policy issues. ORD 615 at 5-6. Additionally, section 552.111 does not generally except from disclosure purely factual information that is severable from the opinion portions of internal memoranda. *Id.* at 4-5. Yet, where a document is a genuine preliminary draft that has been released or is intended for release in final form, factual information in that draft which also appears in a released or releasable final version is excepted from disclosure by section 552.111. Open Records Decision No. 559 (1990). However, severable factual information appearing in the draft but not in the final version is not excepted by section 552.111. *Id.*

¹The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company];
- (2) the extent to which it is known by employees and others involved in [the company's] business; (3) the extent of measures taken by [the company] to guard the secrecy of the information; (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

You have submitted to this office three types of documents you seek to withhold under section 552.111: (1) draft documents, (2) documents exchanged with third parties, and (3) other interagency and intra-agency memoranda and letters. You state that the submitted documents are “working drafts of proposed, but not adopted, rules, and include associated materials generated as part of the deliberative rulemaking process.” You further state that “[b]oth the printed text and written notes reflect current policy-making efforts by the agency in its efforts to address air quality issues in the Houston-Galveston and Dallas-Fort Worth areas.” We agree that the submitted documents reflect the policy-making process of TNRCC. Therefore, we agree that drafts of the proposed rules are excepted under section 552.111. However, the submitted information also contains drafts of other documents that contain factual information. You have not indicated whether final forms of these draft documents exist and were released. Therefore, if the factual information contained in these drafts also appears in the document’s final form that was released to the public, the entire document may be withheld.² Otherwise, if the draft document was never released as a final document, the factual information contained therein must be released to the requestor.

With respect to the documents exchanged with third parties, we note that the information was either received from or sent to a third party that was not acting as a consultant for TNRCC. Therefore, these documents do not qualify as interagency or intra-agency memoranda or letters under section 552.111 and must therefore be released. We have marked these documents.

With respect to the remaining documents, which are neither draft documents nor documents exchanged with third parties, we agree that some of the information contained therein constitutes advice, opinion, and recommendations; therefore, this information may be withheld under section 552.111. We have marked the information that may be withheld. However, with respect to the remaining information in these documents, we are unable to discern, nor do you indicate, whether the information constitutes advice, opinion, or recommendations. Therefore, you must release this information.

In summary, you must withhold the documents you have indicated to be excepted under section 552.110 of the Government Code. Likewise, you may withhold drafts of the proposed rules under section 552.111 of the Government Code. However, with respect to other draft documents contained in the submitted information, you may only withhold them in their entirety if the final version has been released to the public. Otherwise, factual information contained in these draft documents must be released. Furthermore, you must release those documents that were exchanged with third parties for which you asserted only section 552.111. Finally, while you may withhold the advice, opinion, or recommendations contained in the remaining documents, i.e., those documents that are neither drafts nor

²We note that if a final version of a document has already been released to the public, it must be made available to the requestor. See Gov’t Code § 552.007.

documents exchanged with third parties, you must release the remainder of the information contained therein because it does not appear that, nor have you indicated how, this information is covered by section 552.111.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

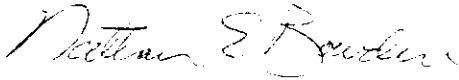
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the General Services Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Nathan E. Bowden
Assistant Attorney General
Open Records Division

NEB/er

Ref: ID# 143021

Encl: Submitted documents

cc: Mr. James C. Morris, III
Thompson & Knight
1200 San Jacinto Center
98 San Jacinto Boulevard
Austin, Texas 78701-4081
(w/o enclosures)

Mr. John B. Turney
Bell, Turney, Coogan & Richards, L.L.P.
Attorneys at Law
823 Congress, Suite 706
Austin, Texas 78701
(w/o enclosures)